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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

GENERAL MOTORS CORPORATION, *Petitioner*

v.

EVERT ROMEIN, ET AL., *Respondents*

FORD MOTOR COMPANY, *Petitioner*

v.

ARTURO GONZALEZ, ET AL., *Respondents*

On Petition For A Writ Of Certiorari To The Supreme Court Of Michigan

BRIEF OF *AMICUS CURIAE*, THE NATIONAL COUNCIL OF SELF-INSURERS, IN SUPPORT OF PETITIONER

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(Pursuant to the consent of all the parties, this brief is filed under Supreme Court Rule 37.)

The National Council of Self-Insurers speaks for major employers of the United States, frequently multi-state employers. These are employers who assume the direct responsibility of paying workers' compensation benefits to their employees, a method sometimes referred to as "self-insuring" under applicable state and federal workers' compensation laws. It is generally accepted that 30% of the employees of the United States work for employers who are self-insured.

This National Council is also the parent organization for 30 state self-insurance associations who are active in each state on workers' compensation issues.

The National Council supports the workers' compensation laws as an essential part of the social and economic framework of our society. But, like our state and federal governments, the National Council is concerned with the proliferation of duplicating benefits in our society. The cost of benefits has grown enormously, affecting price levels to consumers and inhibiting the ability of United States employers to export their products.

The proliferation and cost of benefit programs is the subject matter of this case.

STATEMENT

The workers' compensation issue before the Court in this matter is often described as "coordination" or "integration" of benefits, the offsetting of alternative benefits for income maintenance against workers' compensation benefits for that same income maintenance purpose.

The issue has a historic background. Workers' compensation was this nation's first no-fault program for sustaining the income capacity of an employee injured in his

employment. In the 1910-1920 period, every state and the federal government adopted workers' compensation statutes covering employment in each jurisdiction.

Beginning in the 1930's, other programs developed to maintain the income of individuals suffering wage loss for other reasons. The federal government enacted unemployment benefits for the unemployed, and social security for retirees and the disabled. These programs were independently enacted with little regard for each other, and without regard to other duplicative programs, such as workers' compensation.

Following World War II, programs for group insurance, for weekly benefits payable during a period of non-occupational disability, and for company retirement programs developed rather fully in major industries. Many of these private income maintenance programs were adopted without regard for the other programs already in place for income maintenance.

As a result, individuals in our society often sought and obtained income maintenance benefits from more than one of these programs. In combination, amounts received by an individual for income maintenance while not working often exceeded his earnings when he did work.

As a corollary, efforts to control the costs of workers' compensation, social security, pension programs and medical disability programs were totally frustrated when all these income avenues were available and could accumulate.

The effort to coordinate or integrate these various benefits to prevent abuse has been a continuing one. In the last section of the Occupational Safety and Health Act of 1970, Congress created the National Commission on State Workmen's Compensation Laws (84 Stat. 1600 *et seq.*) to examine and make recommendations about workers' compensation. That Commission reported its recommendations back to Congress in 1972. Its Recommendation R. 33 stated:

> We recommend that . . . the benefits of other public insurance programs should be coordinated with workmen's compensation benefits. *Report of National Commission on State Workmen's Compensation Laws*, p. 58.

The International Association of Industrial Accident Boards and Commissions (the association of state workers' compensation administrators, commonly referred to as the IAIABC) formally adopts recommended standards for all the states. In 1980 it adopted coordination of benefits as one of its standards:

> 11. Coordination of Benefits
>
> Compensation payable for total disability or survivor benefits should be coordinated under the jurisdiction's law with social security and other employer-funded disability programs so as to best effectuate the objectives of wage replacement and rehabilitation.

And in the explanation, it added ". . . to avoid overlapping and duplication of benefits." This remains its current standard. *Journal of International Association of Industrial Accident Boards and Commissions*, Summer Issue, 1990, p. 43.

The importance of controlling the costs of these multiple benefit programs did not escape Congress. In 1974, Congress enacted ERISA, a program governing pension plans. ERISA expressly permits this same coordination or integration of benefits. In 1977, when the State of New Jersey passed a statute forbidding any integration or coordination of workers' compensation and pension benefits, this Court in *Alessi v. Raybestos-Manhattan*, 451 U.S. 504 (1981), declared the state statute null and void as preempted by ERISA, a federal law. This preserved the same coordination or integration of benefits involved in the instant case.

The Congress in 1967 amended the Social Security Act to require coordination (or offsets) between workers compensation and social security disability benefits. Sec. 224, Social Security Act, upheld in *Richardson v. Belcher*, 404 U.S. 78 (1971).

Alessi was decided in March, 1981. The Michigan legislature in December of its 1981 session adopted, effective March 31, 1982, integration or coordination of workers' compensation with pensions and social security benefits much like this Court described in *Alessi*. Its action was prospective; no claimant had to pay back any amounts previously received, but continued "double dipping" was eliminated.

The instant case arises because of the efforts of the plaintiffs below to retain the duplicating benefits of pension, social security, and workers' compensation, which collectively exceeded the plaintiffs' income when they worked.

The facts of this case, as stated by the majority opinion below, portray the 1981 situation. Plaintiff (and GM employee) Romein was receiving $12,513.80 a year in workers' compensation benefits, pursuant to a formula entitling him to two-thirds of his gross earnings. Such workers' compensation benefits are tax-free under Internal Revenue Code §104(a)(1), so this $12,513.80 was very close to his former "take home pay" when he worked. In addition, Romein was receiving social security and General Motors' company pension, which with his workers' compensation benefits totalled $19,377.80 a year, more than he had ever made when he worked, and virtually all of it tax free.

The Michigan legislature, concerned about its business climate and its unemployment rate of over 14%, passed a statute in 1981 forbidding these duplicative payments. Aside from the background of recommendations by the National Commission and the IAIABC, *supra*, and this

Court's decision in *Alessi*, its statute was supported by copious legislative history concerning its aims and purposes, perhaps best summarized in Governor William Milliken's statement:

> . . . we must keep in mind that the purpose of workers' compensation is to restore wage-earning capacity lost in on-the-job accidents. Workers' compensation was never intended to be more lucrative than gainful employment, or be a retirement bonus . . . . (Governor Milliken, November 18, 1981, quoted in the Opinions below)

(This Court noted and followed the same rationale in upholding Congress' action for "coordination of benefits" between social security and workers' compensation in *Richardson v. Belcher*, 404 U.S. 78 (1971), noting that the two benefits collectively exceeded earnings.)

Against this background, the Michigan legislature enacted its "coordination of benefits" legislation in 1981, effective March 31, 1982. The workers' compensation benefit (two-thirds of wages on a tax-free basis) was not reduced, and if he was truly retired (and 62 years of age), he could receive half of his social security benefits (the 50% paid for by his own tax payments) in addition. But, the statute provided that the employer could offset any employer-financed wage loss programs such as company pensions against its workers' compensation obligation. There was no retroactivity; no claimant had to pay anything back. The "double dipping" was eliminated only as payments became due after March 31, 1982. Thus, this statute put some control on the problem of proliferating, accumulating benefit costs.

This workers' compensation problem in Michigan was not peculiar to Michigan. Some 25 states in this same general period took action to prevent this "double dipping" of benefits. Attached hereto as Appendix 1 is the 1990 U.S. Department of Labor publication summarizing similar

statutory changes in 25 other jurisdictions, all set forth in Table 17 of this U.S. Department of Labor publication.

The Michigan Supreme Court upheld the validity of this 1981 legislation in 1985, holding against plaintiffs like Romein in this case. *Franks* v. *White Pine Copper Div.*, 422 Mich. 636, 375 N.W.2d 715 (1985). The pragmatic result was that an employee received the highest benefit allowable under any single program (usually his workers' compensation benefit), but not a combination of all these wage loss programs. This decision was entered in 1985, in a combined opinion, one citation covering the two cases. *Franks* v. *White Pine Copper Div.* and *Chambers* v. *General Motors Corp.*, 422 Mich. 636, 375 N.W.2d 715 (1985).

The definitive legislation of 1981, confirmed by Michigan's highest court, did not settle this issue in Michigan. Thus this case and this Petition for *Certiorari*. In 1987, the Michigan legislature sought to overturn the Supreme Court decision of 1985. Its method was peculiar; it did not change the 1981 legislation in any respect, but provided only that those injured before its effective date of March 31, 1982 should continue to receive multiple benefits. Almost like a "bill of attainder," the 1987 legislative action named the case and stated that the Michigan Supreme Court decision of 1985 had misconstrued the 1981 legislative intent. The actual statute reads as follows:

> The decision of the Michigan Supreme Court in *Franks* v. *White Pine Copper Div.*, 422 Mich. 636 (1985) is declared to have been erroneously rendered insofar as it interprets this section, it having been and being the legislative intention not to coordinate payments under this section resulting from liability . . . for personal injuries occurring before March 31, 1982. It is the purpose of this amendatory act to affirm this intention . . . . Michigan Acts, 1987, PA 28, Sec. 354(17).

This 1987 act then directed employers to pay all arrearages back to 1982 within 60 days, with interest.

As Chief Justice Riley points out in the dissent, p. 8, only "11 of the 26 senators" who voted in 1981 were still in the Senate in 1987, and only "20 of the 62 representatives" who voted in 1981 were around in 1987. The 1987 action reflects the "intention" of its 1987 members, not the intention of the members voting in 1981.

The instant case arises from these plaintiffs suing General Motors and Ford under this 1987 act for all the arrearages in the multiple payments since March 31, 1982, despite the Michigan Supreme Court decision of 1985 declaring that General Motors and Ford (and all other employers) had validly discharged these precise obligations. The Court below then overruled its 1985 decision, bowing to this newly declared "intent," and upheld plaintiffs' claim retroactively back to March 31, 1982, the effective date of the earlier statute. It is this decision for which *certiorari* is sought.

The issue before this Court is of great importance to this *amicus curiae*, the National Council of Self-Insurers, which has members in the 25 states who have enacted similar "coordination of benefit" programs.

For General Motors and Ford, the claims of these plaintiffs amount to a retroactive $25-million liability. While Ford and General Motors may be two of Michigan's largest employers, these two collectively are a distinct minority of all Michigan employers who will now be required to make the retroactive back payments, with interest, commanded by the 1987 statute and the decision below of the Michigan Supreme Court. The total liability is in gross an amount considerably greater than the $25-million mentioned in the decisions below.

Further, the question here, getting some kind of control over the proliferation and overlapping of benefit programs, is important to the nation's economic health and is being

addressed currently by many organs of government, federal, state, and local. That effort gets a decided jolt by decisions such as this one by the Michigan Supreme Court.

REASONS FOR GRANTING THE PETITION

I.

THE DECISION BELOW VIOLATES THE CONTRACT CLAUSE OF THE U.S. CONSTITUTION. THIS COURT DECLARED IN *STATE INDUSTRIAL COMMISSION* v. *NORDENHOLT CORP.*, 259 U.S. 263 (1922), THAT A WORKER'S COMPENSATION "AWARD IS READ INTO AND BECOMES PART OF THE CONTRACT" OF EMPLOYMENT. SO, ALL THE PAYMENTS MADE HERE FROM 1982 TO 1987 WERE PURSUANT TO THAT EMPLOYMENT CONTRACT, IN ACCORDANCE WITH THE 1981 STATUTE AND ITS EXPRESS APPROVAL BY THE MICHIGAN SUPREME COURT IN 1985. THESE PAYMENTS VALIDLY DISCHARGED CONTRACTUAL OBLIGATIONS. THE DECISION BELOW REOPENS ALL THESE CONTRACTS AND DEFINITIVELY INVADES THE CONSTITUTIONAL PROVISION FORBIDDING THE IMPAIRMENT OF CONTRACTS.

It is rudimentary that a workers' compensation statute becomes part of every employment contract covered by that statute, as this Court expressly held in *State Industrial Commission* v. *Nordenholt Corp.*, 259 U.S. 263 (1922). Workers' compensation awards become part of that contractual obligation:

> The contract of employment, by virtue of the statute, contains an implied provision that the employer, if the employee be injured, will pay to him a certain sum . . . . *Ibid.*, p. 271.

If not paid, this contractual obligation to pay can be sued upon and enforced like any other contractual obligation.

The scope of a contract embraces not just the contract itself, but the state law and its judicial interpretations,

as this Court held in *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977). At pp. 19-20, it is stated:

> The obligations of a contract have long been regarded as including not only the express terms but also the contemporaneous state law pertaining to interpretation and enforcement.

Thus the 1981 statute and the 1985 decision of the Michigan Supreme court construing it constitute the contract here, a contract which is retroactively cancelled by the decision below. Past completed transactions pursuant "to the express terms . . . and contemporaneous state law" have been reopened and new and different liabilities created. This is precisely what the Contract Clause forbids.

Michigan's own decisions as well as those of this Court hold that workers' compensation obligations are contractual obligations. *Brown* v. *Eller Outdoor Advertising Co.*, 139 Mich. App. 7, 360 N.W.2d 322 (1984); *Thomas* v. *Parker Rustproof Co.*, 284 Mich. 260, 279 N.W.2d 504 (1938).

The court below, on its own, makes one exception to its retroactive judgment, a curious exception in view of the broad, retroactive sweep it gives to the 1987 statute. It bows to the concept of *res judicata*, by exempting from the 1987 statute any case in which the parties had sued each other and that suit had reached a final judgment.

This produces a curious result; those who respected the words of the legislature and the judicial holding in 1985 are the ones who now must pay the retroactive tribute. Those who did not respect the law and resorted to litigation are exempt from it.

The doctrine of finality is the principle of *res judicata*, as well as that of the Contract Clause. It is embodied in other sections of Michigan's workers' compensation statute, sections not mentioned by the majority below or by the legislative act. One section provides, as a restriction on an employee reopening past transactions:

> . . . no compensation shall be ordered for any period which is more than one year prior to the date of such action. MCL 418.833(a).

The other section of the statute restricts an employer from reopening completed transactions after one year:

> When an employer or carrier takes action to recover overpayment of benefits, no recoupment of money shall be allowed for a period which is more than one year prior to the date of taking such action. MCL 418.833(2).

These two sections, bilaterally fair to employee and employer, were not mentioned in the 1987 statute or in the opinion below. They remain unimpaired in the statute, although the first quoted section is cancelled by the decision below, wthout acknowledging it even exists.

Thus, the statutory scheme of finality of all workers' compensation transactions after one year is totally breached here; completed transactions running back to March 31, 1982 are reopened by the decision below.

The opinion seems to believe making this exception for *res judicata* saves it from what might otherwise be a violation of the U.S. Constitution. It does not; "finality" is the basis of the Contract Clause, too. We are dealing with completed contractual transactions protected by the Contract Clause.

A. The Contract Clause Is Stated In Terms As Absolute As The First Amendment's Protection Of Free Speech. It Forbids "Any Law Impairing The Obligation Of Contracts."

Article I, Section 10 of the U.S. Constitution provides simply that "no state shall . . . pass any . . . law impairing the obligation of contracts . . . ."

The Michigan court below reads the contract clause as if it stated, "No state shall pass any law *unreasonably* impairing the obligations of contracts." "Reasonable" or

"unreasonable" is not the issue when the constitutional impairment stands alone as here, with no competing constitutional issue involved.

In *Chicago Board of Realtors, Inc.* v. *City of Chicago*, 819 F.2d 732 (7th Cir. 1987), Judge Posner wrote at p. 743:

> Imagine what freedom of speech would have come to mean if the court had interpreted the first amendment—which is no more absolute in its language or clearcut in its history than the contract clause—as loosely as it interprets the contract clause.

Amicus suggests that the contract clause should be enforced as it is written in the Constitution in the instant case. There is no competing constitutional value to weigh in this case, nor any "compelling demonstration of necessity" requiring that the contract clause be regarded as just one of a hierarchy of constitutional values. Nor is there any crisis shown here even faintly resembling the problem faced by this Court in the 1934 Depression requiring any balance of competing considerations as in *Home Building & Loan Association* v. *Blaesdell*, 290 U.S. 398 (1934).

Cases may arise presenting a conflict between two constitutional values, each absolute in itself, where some rule of reason may have to be applied. But in this case, only one constitutional value is involved, the Contract Clause and the Rule of Law in our society. No countervailing constitutional value is asserted which requires any weighing or "rational relationship" test.

The court below had no basis even to explore any "rational relationship" test.

B. The Majority Opinion Below Does Not Pass Any "Rational Relationship Test," Even If That Test Is Applicable.

The majority opinion seems to state first that there is no contract here to be impaired, despite the Michigan de-

cisions clearly holding that these workers' compensation issues involve contractual obligations. *Brown* v. *Eller Outdoor Advertising Co.*, 139 Mich. App. 7, 360 N.W.2d 322 (1984).

The majority below then quickly leaves this position, admits there is a contract and a contractual impairment here, and discusses whether it can be justified. For this purpose, it launches into a three-part balancing test. Opinion, pp. 16-19, with the following assertions:

1. The Impairment of Contract Is Not Substantial.

One assertion of the majority below is that the impairment of contract is not substantial. *Amicus* submits that the $25-million liability imposed on Ford and GM is "substantial."

The majority opinion below avoids discussion of such a simple answer to its own question by going to the opposite extreme. It launches into a discussion of the employer's immunity from tort actions, asserting this immunity to be the "basic benefit" to the employer. Because this "basic benefit" is undisturbed by the 1987 legislation, the majority declares there is no "substantial" impairment of contract.

Under this analysis, any amount of retroactive liability, perhaps tripling the compensation payments in all cases since 1920 (with compound interest) would be permissible, so long as the exclusive remedy was not disturbed. *Amicus* submits this is not the law.

This Court held in *Allied Structural Steel* v. *Spannaus*, 438 U.S. 233 (1978), that requiring an employer to pay pensions which had not yet contractually vested was a "substantial impairment of contractual expectations." The question according to Justice Stewart is whether something significant *has been taken away* by the statute, not whether it leaves anything of some value. (The sum involved in

Spannaus was $185,000 compared to the stated $25-million liability and was held to be a substantial impairment.)

Under the majority's analysis, there must be a total destruction of all value before a legislative act could be considered unconstitutional. But, as this Court has repeatedly held, "total destruction of contractual expectations is not necessary for a finding of substantial impairment." *Energy Reserves Group* v. *Kansas Power & Light*, 459 U.S. 400 at 411 (1983); *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 at 26-27 (1977). Most lower courts have so held, too. *State of Nevada Employees Association* v. *Keating*, 903 F.2d 1223, at 1227 (1990) (restriction of employees' right to withdraw pension contributions without penalty); *Michael* v. *Workers' Compensation Court*, 763 P.2d 1122, 1125 (Montana, 1988) (mandatory mediation of disputes causing delay in recovering benefits).

So, contrary to the majority opinion below, the issue under the contracts clause is whether something substantial has been *taken away*, not whether anything of value is left. The decision below took "substantial" amounts away from these defendants.

2. There Is No Impairment Because "the Defendants Knew That Their Rights Were Subject to Alteration."

This is a second pillar of the majority's balancing test, and it doesn't fit this case. Every citizen knows that future rights may be altered by a legislature. But, if past completed transactions can be reopened and altered, then no one in our society can possess any reasonable expectations or the confidence required to plan future commitments. Under the majority opinion below, there is no finality at any time, on any issue, and no transaction is ever over or closed. No business, no citizen can make any plans for the future, if the past is so unstable.

Justice Stewart, in *Allied Structural Steel* v. *Spannaus*, *supra*, wrote:

> If the Contract Clause is to retain any meaning at all, it must be understood to impose some limits upon the power of a state to abridge existing contractual rights, even in the exercise of its otherwise legitimate police power. 438 U.S. at 242.
>
> Contracts enable individuals to order their personal business affairs . . . . Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them. *Ibid.* at 245.

There can be no stability in this nation's affairs if legislatures can suddenly reopen several years of completed transactions and decree them null and void. The Contract Clause forbids such gross alteration.

No citizen can plan a future, if they cannot rely on the finality of past, completed transactions. These petitioners had the legitimate expectation, protected by the Constitution, that these past, completed transactions would not be altered.

3. The Legislature and the Courts May Impair Contracts in the "Reasonable Exercise of the Police Power."

This statement from the majority opinion is much too broad. If the police power is unlimited, there is no room left for the Contract Clause, the First Amendment, *res judicata*, or any other constitutional right. Such a statement leaves no place for the Rule of Law in our society.

> If the contract clause is to retain any meaning at all . . . it must be understood to impose some limit up on the power of a state to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power. J. Stewart in *Allied Structural Steel* v. *Spannaus*, 438 U.S. at 242. See also *Pension Benefit Guaranty Fund* v. *R. A. Gray & Co.*, 467 U.S. 717 (1984); *United States Trust Co.* v. *New Jersey*, 431 U.S. at 22.

As to whether the 1987 legislation meets any special need requiring the use of the police power, there is absolutely no legislative history or record concerning that need, no problem described in a legislative record, no explanation of any problem or how this legislation meets the problem. *Garris* v. *Hanover Insurance Company*, 630 F.2d 1001 (4th Cir. 1980) at p. 1009 states the necessity of legislative sources to evaluate the rationality of a contract clause challenge. There is none in this case.

The majority opinion, however, invents its own assumption to support the lack of any legislative finding of problem or need. It assumes, although it is nowhere stated in the statute or legislative history, that the legislature in 1987 wanted to help employees whose benefits were not increased in other legislation enacted in 1981.

The majority opinion's assumption is false, aside from the propriety of a court's supplying its own justification, where the legislature itself has omitted any justification. The plaintiffs here suffered no decrease in benefits compared to other employees in 1981 or 1982. This coordination of benefits statute was a separate bill having nothing to do with the amount of benefits. The opinion below confuses two separate legislative statutes enacted in this period, one of which gave a benefit increase to this Plaintiff Romein. This was Michigan Public Act 357 of 1980. It had nothing to do with coordination of benefits.

The statute gave increases to prior injury cases, such as these plaintiffs; all claimants having accidents between 1965 and 1979 received increased benefits, running from 10.3% to 86.6%. Plaintiff Romein, whose accident was in 1977, received $21 more per week. MCL 418 352. Record Exhibit II-4. (This $21 a week increase was paid from the

state's general fund, not by employers, thus avoiding any issue of retroactivity and impairment of contracts.)

This clear fact destroys the assertion by the majority, its attempt to invent a "rational" reason for the 1987 statute; pre-1981 claimants did get increases in 1981.

Coordination of benefits, the subject here, was passed later, in December, 1981, effective March 31, 1982, in a bill confined to that subject. Michigan Public Act 203 of 1981.

Consequently, the court-supplied assumption to justify the 1987 legislation, that the 1987 legislature wanted to give benefits to pre-1981 claimants who received none, was a false one. No explanation other than this assertion by the court itself is offered of any need or intent, or how the 1987 legislation might meet that need. There is none in any legislative record, and the majority's invented assumption is false.

Amicus submits there is no problem or need described anywhere justifying even a "reasonable exercise of the police power" to justify retroactivity. There is no conflict between any competing constitutional rights requiring a weighing of "rational relationship," nothing which permits a legal challenge to the clearly stated Contract Clause of the U.S. Constitution.

II.

LEGISLATORS MAY ACT ONLY DURING THE PERIOD THEY HOLD OFFICE. A CURRENT LEGISLATURE CANNOT ACT FOR OR BIND FUTURE OR PAST LEGISLATORS WITHOUT VIOLATING DUE PROCESS OF LAW.

Due process of law in various forms is argued in other briefs. This *amicus* will confine itself to a discussion of the temporal time limits on assertions of power by legislators.

As set forth under the Statement of Facts, the 1987 Michigan legislature purported to construe (actually to

change) the "intent" of the 1981 legislature, after the 1981 statute passed through the crucible of judicial construction in 1985. The 1987 statute as enacted simply stated that the 1981 legislature's "intent" differed from that found by the Michigan Supreme Court in *Franks* v. *White Pine Copper Div.* and *Chambers* v. *General Motors Corp.*, 422 Mich. 636, 375 N.W.2d 715 (1985).

Chief Justice Riley in her dissent points out the ludicrous nature of the 1987 legislators' determining the intent of the 1981 legislators; only 11 of the 26 senators in office in 1981 were still in the senate in 1987, and only 20 of the 62 representatives were still in office in 1987. Thus, there is no basis for the 1987 legislators to assert or change whatever "intent" existed among the 1981 legislators.

It also invades the "time zone" of authority and sovereignty of the 1981 legislature itself by overturning its 1981 vote. This presents the due process question.

Amicus urges the Court to examine an article on this subject, "Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity," *1987 American Bar Foundation Research Journal*, beginning on page 379. The author is Professor Eule of the Law School at the University of California at Los Angeles.

Professor Eule explains why a current legislature cannot "rewrite history" by overturning the votes of its predecessor legislators. At p. 445:

> . . . What if, on January 3, the newly elected representatives conducted a "recount" of all legislative voting that had occurred during the preceding two years, substituting the votes of the new representatives for those of their predecessors?
>
> If these recounts were accompanied by a decree that the bills which could no longer muster a majority vote were to be treated as never having been en-

> acted, we would surely conclude that the spirit, if not the letter of the Constitution had been violated.

This is precisely what the Michigan legislature did in 1987. Professor Eule continues:

> The voters do not delegate authority to rewrite history. Their earlier agents exercised legitimate authority when they enacted legislation. While such efforts may be repealed, this is not the same as retrospective eradication.

Again, Professor Eule describes exactly what the 1987 Michigan legislature did, eradicating not only the 1981 vote, but the 1985 Supreme Court decision, too. Professor Eule then examines the reverse situation, prior bills which did not pass:

> A decision that bills defeated by prior legislators can now be enacted and treated as if they had been enacted earlier arguably runs afoul of this same principle. The then-authorized representatives made a choice, and their decision demands recognition of the polity for that point in time. Each set of elected officials ought to be viewed as endowed by their sovereign with the mandate to make policy choices only within a bracketed temporal zone.
>
> Just as the delegation of authority does not encompass incursions into the domain of legislatures to come, it does not contemplate contravening the sanctity of the past.

Drawing on this Court's analysis in *Allied Structural Steel* v. *Spannaus*, 438 U.S. 233 (1978) (a case *amicus* has cited on impairment of contracts), Professor Eule poses this question: Assume that the Minnesota legislature, from 1963 to 1974, had defeated pension-vesting legislation, but in 1974, that legislation finally squeaks through, not just for new pension plans, but retroactively to 1963, where such bills had been defeated:

> Doesn't such an enactment invade the exclusive domain of the predecessor legislatures? *Ibid.*, p. 397.

Chief Justice Riley in her dissent, pp. 5-6, quotes extensively from the floor debate of 1981 on this coordination of benefits bill. The remarks of Representatives Cushingberry, Emerson, Vanek, and Kelsey in opposition to its passage expressly recognized the bill's content and its "intent" as it passed.

And, in 1982, Senate Bill 834 proposing to repeal this 1981 vote on coordination of benefits was soundly defeated, a further demonstration of the legislative "intent" to enact and retain this "coordination of benefits" statute. Thus, the content and the "intent" was clearly fixed in 1981, as the Michigan Supreme Court held in 1985. The 1987 legislature can repeal the 1981 statute, but it cannot change the clearly expressed intent of that statute, or deny its enactment.

Amicus submits that the 1987 legislature, consistent with due process of law, did not have the power to rewrite the history of 1981 and 1982 and declare that these clearly recorded actions embodying the content and the "intent" never occurred.

Professor Eule submits that restricting legislatures to the time zone of their authority is part of due process, and "serves as our guide to assessing retroactivity where specific clauses of the Constitution, (*ex post facto*, contract or takings) are not applicable." *Ibid.*, p. 397.

Without this constitutional structure of due process, there is no stability, past transactions are never final, plans and expectations based on stability of law are not allowed to any citizen.

With actions and decisions such as occurred in Michigan, set forth fully and precisely in this record, there is no Rule of Law; when the past is unstable, there are no stable premises permitting citizens to make future com-

mitments. The whims of legislators may control our future, but due process forbids those whims to control our past as well.

CONCLUSION

For these reasons, the National Council of Self-Insurers, as *amicus curiae*, urges this Court to grant the Petition for Certiorari.

Respectfully submitted,

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APPENDIX 1

State Workers' Compensation Laws

U.S. Department of Labor
Employment Standards Administration
Office of Workers' Compensation Programs
Branch of Workers' Compensation Studies

January 1990

TABLE 17. OFFSET PROVISIONS
IN STATE WORKERS' COMPENSATION LAWS

ALASKA

Section 23.30.225(a)—When periodic retirement or survivors' benefits are payable under Title II of the Social Security Act (42 U.S.C., 301 et seq.), the weekly compensation for total disability or death shall be reduced by an amount equal to one-half of the Federal benefits for such week. (b) When a claim has been filed under this chapter, any weekly disability benefits payable shall be offset by benefits in accordance with 42 U.S.C., 401 et seq., by an amount which exceeds 80 percent of the employee's average weekly wage at the time of injury. (c) When employer contributions to a pension or profit sharing plan are used in determining gross earnings and the employee is receiving pension or profit sharing payments, the weekly compensation benefits for total disability and death will be reduced.

Section 23.30.187—Compensation for temporary total disability is not payable during any week in which unemployment compensation benefits are also payable.

CALIFORNIA

Section 4753—Additional compensation for subsequent injuries shall be reduced by any monetary payments from any source, except for a pension or a service-connected disability which was incurred in the U.S. armed forces.

Section 4904—Permits liens to be made against temporary total disability indemnity for any unemployment compensation disability benefits being received.

COLORADO

Sections 8-50-103 and 8-51-101—Benefits for disability in this State shall be reduced by 50 percent and death by 100 percent of any Federal OASDI payments, or the workmen's compensation act of another State or of the Federal Government, or of an employer pension or disability plan.

Section 8-51-101(1)(c)(ii)—Permanent total disability benefits shall be reduced by 50 percent of any Federal OASDI payments received after the claimant reaches the age of 65, or in the case of a claimant who begins to receive employer-paid retirement payments at the age of 65, by an amount determined as a percentage of such benefits.

Section 8-51-101(1)(f)—Weekly temporary and permanent total disability benefits shall be offset by 100 percent of any unemployment compensation benefits received for the same week, with certain exceptions.

DISTRICT OF COLUMBIA

Section 36-308(g)—Weekly compensation benefits are offset if the sum of any Federal Old Age Survivors Insurance benefits, or any employee benefit plans subject to the Employee Retirement Income Security Act of 1974,

or any other employee income maintenance plan which is funded solely by the employer plus such weekly compensation benefits exceeds 80 percent of the employee's average weekly wage.

FLORIDA

Section 440.15(3)(b)(4)—Provides that if an employee is entitled to both wage-loss benefits and social security retirement benefits, the social security retirement benefits will be primary and wage-loss benefits supplementary. The sum of any combined benefits must not exceed the amount of wage-loss benefits which would otherwise be payable.

Section 440.15(9)—Weekly compensation benefits for disability are offset by the amount of any Federal OASDI payments so that the claimant's total benefits do not exceed 80% of his/her average weekly wage.

Section 440.15(10)(a)—No weekly compensation payments are made for temporary or permanent total disability under the workers' compensation law for any week in which unemployment compensation benefits are paid.

Section 440.15(10)(b)—Offsets wage-loss or temporary partial disability benefits by the amount of any unemployment compensation benefit payments.

LOUISIANA

Section 1225—Permanent total disability benefits payable under the Act will be reduced for those recipients who are also receiving Federal OASDI benefits. This reduction is to be made only to the extent that the amount of the combined Federal and State workers' compensation benefits would otherwise cause or result in a reduction of the Federal benefits pursuant to the Social Security Act (42 U.S.C., Section 424a).

Section 1225-B—No compensation will be paid for temporary or permanent total disability or supplemental earnings benefits during any week in which the employee is receiving or entitled to receive unemployment compensation benefits.

MAINE

Section 111-A—Offsets benefits for personal injury or disease under an insured disability or medical payments plan against payments for workers' compensation.

Section 62-A—Reduces benefit payments by the amount of any concurrent unemployment compensation benefits, excluding lump sum settlements and scheduled permanent partial disabilities.

Section 62-B—Reduces total and partial disability benefits by:

(1) Fifty percent of the amount of old age insurance benefits received under the Federal Social Security Act;

(2) The after tax amount of the payments received under an employee benefit plan provided by the same employer, if the employee did not contribute directly to the plan; and,

(3) The proportional amount, based upon the ratio of the employer's contributions to the total contributions, if the employee did contribute directly to the plan.

MARYLAND

Section 36 (1)(a)—Cost-of-living increases for employees who are entitled to compensation for permanent total disability under this section and for disability under the Federal social security act will be reduced to avoid a diminution of the Federal benefits.

MASSACHUSETTS

Section 36 B(1)—No benefit shall be payable for temporary total and permanent total disability for any week in which the employee has received or is receiving unemployment compensation benefits.

Section 36 B(2)—Any unemployment compensation benefits received will be credited against partial disability benefits for the same period or credited against any future partial disability benefits which are or may become payable.

MICHIGAN

Section 418.354—Temporary total disability benefits will be reduced by 50 percent of any Social Security benefits; and by amounts received after taxes under any self-insurance plan, wage continuation plan, pension or retirement plan provided by the employer to which the employee does not contribute.

Section 418.354(1)(f)—Temporary total disability benefits will be coordinated with those from employer contributions to a qualified profit sharing plan where the employer does not provide a pension plan.

Section 418.358—Offsets temporary total, permanent total, and permanent partial disability benefits under the workers' compensation act dollar for dollar by unemployment compensation benefits.

MINNESOTA

Section 176.101, Subdivision 4—After $25,000 is paid for permanent total disability, benefits paid by any government disability program, or any old age and survivors' insurance benefits program are credited against workers' compensation benefits, if such disability benefits are occasioned by the same injury.

Section 176.111, Subdivision 21—Death benefits shall not exceed 100% of the deceased employee's weekly wage at the time of the injury causing his death, when the total weekly government survivor benefits and the state workers' compensation benefits are combined, nor be payable for any week in which the government benefits exceed such percentage.

MONTANA

Sections 39-71-701(2) and 39-71-702(2)—If periodic disability benefits are payable to the worker under the Federal OASDI, weekly temporary total and permanent total disability benefits resulting from both injury and occupational disease shall be reduced by an amount approximating one-half (but not below zero) of the Federal benefit for such week which amount is to be calculated from the date of the social security disability entitlement.

NEW JERSEY

Section 34:15-29—Workers' compensation benefits may be offset against disability pension benefits or payments.

Section 34:15-95.4—Supplemental benefits for permanent total disability and death shall be offset by any Federal survivor or disability benefits, black lung, or disability pension benefits.

Section 34:15-95.5—Reduces permanent total disability or subsequent injury benefits of individuals under age 62 by Social Security benefits where the period of disability began after December 31, 1979.

NEW MEXICO

Section 52-1-70 A&B—Offsets unemployment compensation benefits against total disability benefits. If a worker

is concurrently entitled to both types of benefits, the unemployment compensation benefits shall be primary and total disability benefits shall be supplemental only, and the sum of the two benefits shall not exceed the amount of total disability benefits otherwise payable.

NEW YORK

Section 16(1-c) and (7)—Applies a statutory offset of a sole surviving spouse's compensation by up to 50 percent of his or her social security benefits, if any. Further, provides that in computing the offsets, any increase in benefits under the Social Security Act that occurs after the date of death shall not be considered; and any such offset shall be equally applicable to payments under the Social Security Act which are received retroactively, but shall not apply to increases for such benefits received retroactively.

NORTH CAROLINA

Section 97-42.1—Provides that compensation for temporary total or permanent total disability benefits may be reduced by the amount of any unemployment insurance benefits received for the same period.

NORTH DAKOTA

Section 65-05-08—Offsets partial or total disability benefits of any worker who fails to report wages received from any part-time or full-time employment.

Section 65-05-09.1—The aggregate benefits payable for temporary total or permanent total disability shall be reduced, but not below zero, by an amount equal as nearly as practical to one-half of the benefits payable under Title II of the Social Security Act (42 U.S.C. 423) and will not

be affected by any increase or decrease in Federal benefits. Any escalation of temporary or permanent total disability benefits, which would adversely affect the bureau's right to offset workers' compensation benefits against social security benefits, shall not be applicable to persons whose benefits are offset, as provided for in this chapter.

Section 65-05-09.2—Retirement offset. If a claimant is entitled to permanent total disability benefits and social security retirement benefits under 42 U.S.C. sections 402 and 405, the aggregate wage-loss benefits payable under this title must be determined in accordance with this section. The employee's social security retirement offset must equal forty percent of the calculated ratio of the employee's average weekly wages, as calculated on the commencement of the first, or recurrent, disability to the current State's average weekly wage. Any offset calculated cannot exceed forty percent of the employee's weekly social security retirement benefits. If a claim has been accepted on an aggregate basis and the worker is eligible for social security benefits, the bureau's offset must be proportionally calculated.

OHIO

Section 4123.56—Applies an offset against temporary total disability payments in the event of concurrent and duplicative benefits under an employer funded nonoccupational benefits plan.

OREGON

Section 656.209—Provides for a social security offset against permanent total disability benefits determined and authorized by the Department in each case. Such offset must not result in a reduction of benefits to an amount less than the greater of the workers' compensation bene

fit, the total family benefit under Social Security, or 80% of the average current earnings as determined by Social Security.

UTAH

Section 35-1-67(4)—After the first 312 weeks of permanent total disability payments have been made, future payments will be reduced by the dollar amount of 50 percent of the Social Security retirement benefits received by the employee during the same period.

Section 35-1-68(2)(A)(ii)—Reduces weekly death benefits to wholly dependent spouses after the first six-year period following an employee's death by 50 percent of any Federal social security death benefits.

WASHINGTON

Section 51.32—Reduces temporary and permanent total disability benefits to allow an offset for social security retirement benefits under the Federal OASDI, in a manner similar to Section 51.32.220 below.

Section 51.32.220—Reduces temporary and permanent total disability benefits for persons under age 65 by an amount equal to the benefits payable under the Federal OASDI, under certain conditions.

WISCONSIN

Section 102.44(5)—Reduces disability benefits under this section when the employee also receives social security disability benefits. Combined workers' compensation and social security disability benefits are limited to 80 percent of the employee's average current earnings. However, such benefits may not be reduced to an amount less than the benefits payable under this chapter.

WYOMING

Section 27-14-401(iii)—Prohibits an employee who is receiving unemployment compensation to receive disability benefits under the workers' compensation act.